80-145

No.

Supreme Court, U. S.
FILED
JUL 30 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1980

C.FRED UNDERWOOD,
CHLOE UNDERWOOD, and
JACK D. CANON,

Petitioners,

v.

THE SECRETARY OF THE INTERIOR
OF THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

William Braly Murray
Attorney for Petitioners
505 Title & Trust Building
321 S. W. Fourth Avenue
Portland, Oregon 97204
Telephone: (503) 226-3819

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1980

C FRED UNDERWOOD,
CHLOE UNDERWOOD, and
JACK D. CANON,

Petitioners,

v.

THE SECRETARY OF THE INTERIOR
OF THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

QUESTIONS PRESENTED

First: Whether administrative policy holding pumice to be a nonlocatable mineral unless it is used as an abrasive prevails over the Common Varieties Act as written by Congress, which makes pumice a locatable mineral where (1) the pumice

was located prior to July 23, 1955, the date of the Act, or (2) where the pumice deposit has "some property giving it distinct and special value", or (3) where the pumice meets the statutory definition of block pumice by having one dimension of two inches or more.

Second: Whether, upon construing the record as a whole, the Secretary's finding that plaintiffs' ten mining claims were null and void is supported by substantial evidence.

Third: Whether a rule 56 summary judgment is appropriate when based on the administrative file, where there is controversy as to material facts and where the agency is not entitled to prevail as a matter of law.

PARTIES INVOLVED

All parties involved are named in the caption. Cecil D. Andrus is the Secretary of the Interior of the United States of America at present.

TABLE OF CONTENTS

	Page
A. Questions presented	1
B. Parties involved	3
C. Table of contents and table of authorities	4
D. Opinions Below	6
E. Jurisdiction	7
F. The Common Varieties Statute	7
G. Statement of the Case	7
H. Reasons for Granting the Writ	16
1. The agency ruling followed below, which makes the locatability of pumice depend on its use, not its dimensions, would alter and rewrite the law enacted by Congress	16
2. The standard for review of agency action followed by the Ninth Circuit conflicts with other circuits.	23

Page

3. Rule 56 F.R.C.P. summary judgment is not appropriate where substantiality of the evidence is at issue. 24

TABLE OF AUTHORITIES CITED

Page

Baker v. United States, 613 F2d 224 (9th Cir. Feb. 1980) 8, 17

Beane v. Richardson, 457 F2d 758 (9th Cir) 26

Castle v. Womble, 19 L.D. 455 9

Charlestone Stone Products Co., Inc. v. Ancrus, 553 F2d 1209 (9th Cir. 1977) 8

Chrisman v. Miller, 197 U.S. 313 9

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 25

Cream Wipt Food Products Co. v. Federal Security Administrator, 187 F2d 789 (3rd Cir. 1951) 24

Dredge Corp. v. Penny, 338 F2d 456 (9th Cir. 26

Henrikson v. Udall, 350 F2d 949 (9th Cir) 26

Litton Dental Products Etc. v. N.L.R.B, 543 F2d 1085, 1087 (4th Cir. 1976) 24-25

Mueller Brass Co. v. N.L.R.B. 544 F2d 815 (5th Cir 1977) 25

	Page
Nickol v. United States, 501 F2d 1389 (19th Cir)	26, 27
Universal Camera Corp. v. N.L.R.B, 340 U.S. 474	23, 24, 27
Statutes and Regulations	
28 USC Sec 1254	7
28 USC Sec. 1331	8
30 USC Sec 611	7, 23, A-68
43 CFR Sec 3711.(b)	11
Verrue v. U. S., 457 F2d 1202 (9th Cir. 1972)	8
Multiple Surface Uses of the Public Domain Amendments, Hearing on S 1713 before the Comm. on Interior and Insular Affairs, 84th Cong. 1st Sess. 40-41 (1955)	18-21

OPINIONS BELOW

The administrative decision of the Interior Board of Land Appeals was published 22 IBLA 62. It is dated September 18, 1975. It is set forth in the Appendix A-5. It incorporates and adopts the opinion of Administrative Law Judge Dean F. Ratzman, which was dated March 5, 1975

The unpublished opinion of the United States District for the Eastern District of California is set out in the Appendix A-51. It was dated June 22, 1977.

The memorandum decision of the United States Court of Appeals for the Ninth Circuit dated March 18, 19 80 is set forth in the Appendix A-1. That court's order denying petition for rehearing was issued May 1, 1980.

JURISDICTION

This petition for writ of certiorari is timely filed within 90 days from May 1, 1980, when the United States Court of Appeals for the Ninth Circuit entered its order denying petition for rehearing.

The statutory provision believed to confer jurisdiction on this Honorable Court is 28 U.S.C. Section 1254.

THE COMMON VARIETIES STATUTE

The pertinent text of the Common Varieties Statute, 30 U.S. C. Sec. 611 is set forth in the Appendix A-68.

STATEMENT OF THE CASE

The United States District Court for the Eastern District of California was the federal court of first instance

It had jurisdiction under 28 U.S.C. Section 1331 to make judicial review of administrative action under the Administrative Procedure Act.

The mining claims were located in 1916, long prior to enactment of the Common Varieties Act of July 23, 1955, 30 USC Sec. 611. When the claims were located, common variety pumice was a locatable mineral. The Act was not retroactive. It applies only to common variety pumice which is located after, not before, the effective date of the Act. Verrue v. United States, 457 F2d 1202 (9th Cir. 1972); Charlestone Stone Products Co., Inc. v. Andrus, 553 F2d 1209 (9th Cir. 1977); Baker v. United States, 613 F2d 224 (9th Cir. Feb. 1980).

The District Court found that the

claims are presently valuable and that the pumice was commercially useful in 1955. A-58.

The Interior Board of Land Appeals found: "There is admittedly much evidence in the record relating to marketability at the time of the hearing." 22 IBLA 64 A-9.

Mr. Emmett Ball, the agency's mineral examiner and chief witness, did not testify that a prudent man would not be justified in spending labor and means with a reasonable prospect of success in developing the claims into a profitable mine, under the "prudent man" rule of Castle v Womble, 19 L.D. 455; Chrisman v. Miller, 197 U.S. 313. Mr. Ball testified that "prudent business men do invest their money in the mining, processing and distribution

of pumice in various areas in the United States. Tr 37.

A block making plant was installed on the claims in 1916-1917 to commercially exploit the pumice deposit. Ex AA, Tr 114, 115. After a couple of years or so, the block making operation of 1916-1917 was terminated because of war time restrictions. Tr 115.

The present day appearance of the claims indicates that substantial amounts of pumice were mined by mining claimant's predecessors in title prior to 1955, for trees about thirty years old are growing in excavated areas. Tr 94

Based on an aerial photograph taken in 1955, Mr. Ball found that ten acres on the contested claims had been mined prior to the date of the

photograph.

Thus there was a specific market demand for pumice from the contested claims. Existence of a general market demand for pumice and its uses is shown by Exhibit FF.

Mr. Ball testified that this property offers "about as economical a mining operation as you can conceive." Tr 51 and that the material is suitable for many commercial uses. Tr 33-34.

The pumice on the claims had a positive commercial value, statewide and county wide. Tr 73 (Ball).

Pumice on the contested claims is expressly excluded from the Common Varieties Act, for it has "distinct and special properties which make it Commercially valuable for use in a manufacturing, industrial or processing operation. 43 CFR Sec 3711.(b)

The Memorandum decision is based on great deference to the agency opinions. But such deference has no probative value where the agency opinions are not supported by substantial evidence.

There is no least comment or mention of evidence in the Memorandum decision given by mining claimants' witnesses: Jack G. Canon Tr 239, C. Fred Underwood Tr 136, Edward W. Morris Tr 273, and mining engineer John K Roof Tr 287. Their evidence not mentioned in the Memorandum establishes commercial operation and commercial demand for pumice and its marketability and saleability both prior to July 23, 1955, and after.

The standard for judicial review of administrative proceedings requires consideration of the evidence in the record as a whole, including evidence opposing the agency's view.

Mr. Ball testified that this pumice has unique characteristics as compared to other minerals which are used for building purposes, like light weight, TR 71 and that blocks made with it, being only half the weight of blocks made with ordinary sand and gravel, offer important advantages both in the cost of shipping and the cost of construction. Tr 40, 41.

Mr. Ball explained that pumice deposits vary in their physical properties, and some pumice cannot be used. Tr 83. Such deposits are not usable and lack the special qualities which make plaintiffs' pumice valuable for block manufacturing.

There is no other available source of pumice suitable for making blocks closer to the mining claimants' Yreka plant than Bend, Oregon, 300 miles distant. The cost of the Bend source was $10 a

ton, while the cost of pumice from the contested claims was $3 a ton. The Yreka plant made a higher profit from blocks made with pumice from the contested claims. Tr 167.

Moreover, the block pumice present on the claims is expressly excluded in the Common Varieties Act from the list of minerals made nonlocatable. Block pumice is defined by the Act as that which occurs in nature with one dimension of two inches or more. Mr. Ball stated that the mining claimants' samples, Exhibits W-1 through W-10, received Tr 158, resemble the pumice which he observed on the various claims. Tr 42-43. The samples, taken by Mr. Underwood from each of the contested claims show pumice with dimensions of two inches or more.

The agency had the burden of proving a prima facie case. Its witness could offer no substantial evidence to show that the large amount of pumice actually removed prior to 1955 from the large excavations was not commercially used. The inference that so much pumice would not have been mined if it had not been economically rewarding has not been overcome by the agency's testimony. Since the agency did not establish absence of commercial exploitation of the deposit prior to 1955, there was no prima facie showing for the mining claimants to overcome and no burden of proof shifted to them. The fact that successful commercial use of the deposit was made after 1955 by Stewart Masonry, using the same road system which existed prior to 1955, shows that lack of a road system giving access did not prevent commercial use

of the deposit by the mining performed earlier, and the agency surmise based on inaccessibility of the deposit has no evidentiary support. As a consequence the mining claimants' motion to dismisss, timely made, should have been allowed.

The agency's Rule 56 motion for summary judgment should have been denied. It was not justified by the administrative record. Inadequacy of the administrative record cannot be supplied by surmise and conjecture. The decision below, which is based on guesswork should be reversed.

REASONS FOR GRANTING THE WRIT

There are special and important reasons why the writ of certiorari should be granted in this case. The principal issue is whether agency policy should be allowed to invalidate mining claims which are held in compliance with the

mining law as written by Congress. The Court of Appeals decided an important question of federal law which should be settled by this Court.

If the agency's decision stands, it means that the agency makes the laws, not Congress, for the decision amounts to a legislative enactment by an executive tribunal. The agency possesses no such authority under our system of separation of powers. Baker v. United States, 613 F2d 224 (9th Cir. Feb. 10, 1980).

In Baker, it was held that the agency's adoption of the "Too Much" rule was "an abuse of discretion which was contrary to existing mining law. The result reached was arbitrary and capricious." Here, the agency's adoption of a rule that pumice is not locatable unless it is used as an abrasive,

rewrites the provision made by Congress in 30 USC Sec 611 that block pumice, having one dimension of two inches or more is a locatable mineral. Congress established the criterion for distinguishing locatable block pumice from nonlocatable pumice as the dimension in which it occurs naturally; not the use made of the pumice. If Congress had wanted to distinguish between block pumice used as an abrasive as compared to block pumice used for other purposes, it would have stated this basis for excepting block pumice from the section making other types of pumice non-locatable.

A dialogue during Congressional hearings in 1955 between Senator Malone of the U.S. Senate Committee on Interior and Insular Affairs and a Mr. Holbrook, an attorney for a mining company, clarifies this point and shows that

Congress distinguished locatable from nonlocatable pumice on the basis of the size in which it occurs naturally.

"Senator MALONE. Does this not do away entirely with the sandstone, gravel, pumice, pumicite, cinders, clay, and pumice stone?

"Mr. HOLBROOK. Yes; it does.

"Senator MALONE. It cuts all that out.

"Mr. HOLBROOK. Yes; it does, Senator. I was speaking of the overall principle that you had been discussing with me, as to the minerals that can still be located under the mining law.

"Senator MALONE. Pumicite is building material, is it not?

"Mr. HOLBROOK. Well, I thought it was primarily an abrasive.

"Senator MALONE. Yes; but do they not use it, and cinders and clay and pumice, for blocks of some kinds of buildings?

"Mr. HOLBROOK. I think they do, yes. I think so. That is right.

"Senator MALONE. But you would cut all that out. You would not have anything to do with that.

"Mr HOLBROOK. You could not locate for those minerals under the mining law.

"Senator MALONE. Under the amendment?

"Mr. HOLBROOK. That is right.

"Senator MALONE. But you can now?

"Mr. HOLBROOK. Yes sir.

"Senator MALONE. Well now, why do you want to cut them out?

"Mr. HOLBROOK. They are not totally cut out, Senator. Pumice, more than two inches in diameter, in one dimension, would not be excluded. Clays which have peculiar properties would not be excluded.

"Senator MALONE. Well, now, pumice that is in place--you are talking about gravel, or an aggregate?

"Mr. HOLBROOK. Well, I understand that pumice occurs very generally. I am not a geologist. You probably know much more about that than I do. But over great areas--it is a volcanic ejector, so I am told, and it may be small, and some of it occurs in larger blocks. And that is not excluded from location under the mining laws.

"Senator MALONE. But you would be excluded from taking this aggregate of pumice?

"Mr. HOLBROOK. If it is less than 2 inches in one dimension, you would.

"Senator MALONE. Well, now, wherever you find this, is it not a good deal like any other rock, that if you dig a little bit you are likely to find it in place? You know, sometimes there is a flow of this. There is a lava flow. Some of it is in place, and some of it over a few million years has disintegrated. It is like your placer. If you follow it far enough, you will find a ledge sometimes. You do not always find it. It is generally there someplace.

"Mr. HOLBROOK. Wherever you find pumice of those dimensions, it would still be locatable under the mining laws.

"Senator MALONE. Then you would have to dig down through it or go back to where you find the pumice in place, or in chunks larger than 2 inches in diameter, in order to locate it. Then you could locate it.

"Mr. HOLBROOK. That is right, Senator, it has been very carefully reviewed, with the thought that it would not materially interfere with mining operations."

Multiple Surface Uses of the Public Domain Amendments, Hearing on S. 1713 before the Comm. on Interior and Insular Affairs, 84th Cong. 1st Sess. 40-41 (1955) (emphasis added.)

If the agency's abrasive use rule stands, owners of unpatented mining claims who produce pumice for uses other than abrasives will find that they are trespassers, that their mining claims are invalid, that they are liable for damages for the pumice that they have produced for non-abrasive uses from their claims.

The abrasive use rule invented here by the agency is arbitrary, capricious and unreasonable. It deprives the public from locating domestic sources of pumice used as aggregate in building blocks, used for insulation, used for filtering fluids, used for sound proofing, and used for hundreds of non-abrasive uses.

Here, the agency's abrasive use rule makes unlocatable pumice deposits not used for abrasives, when the Common Varieties Act makes locatable (1)

the pumice located prior to the date of the act or (2) a pumice deposit which has "some property giving it distinct and special value" or (3) pumice which meets the statutory definition of block pumice by having one dimension of two inches or more.

There is a conflict between the decision of the Ninth Circuit herein and decisions of other courts of appeals on the same matter. The standards of review of administrative proceedings differ. The great deference for the Secretary's opinion, finding some isolated bits of evidence to support that opinion, in the Ninth Circuit, is contrary to the standard of review called for by this Honorable Court in Universal Camera Corp. v. N.L.R.B., 340 U.S 474, hblding that a reviewing court should set aside an agency decision when it cannot find that the evidence supporting that decision is substantial,

when viewed in the light of the record in its entirety, including the evidence opposed to the agency's view, 340 U.S. at 488. The Supreme Court (Mr. Justice Frankfurter) stressed that reviewing courts must be influence by a feeling that they are not to abdicate the conventional judicial function. Id.490.

The Third Circuit followed Universal Camera and exercised "the conventional judicial function" and concluded that the finding of the Federal Security Administrator establishing a standard of identity for salad dressing was not supported by substantial evidence when the record was considered as a whole. Cream Wipt Food Products Co. v. Federal Security Administrator, 187 F2d 789 (1951).

The Fourth Circuit followed Universal Camera in Litton Dental Products Etc. v. N.L.R.B., 543 F2d 1085, 1087 (1976). It

concluded that the Board's decision and order were entirely lacking in the substantial support in the evidence that is indispensable to Board action.

The Fifth Circuit discussed the appropriate standard of review in Mueller Brass Co. v. N.L.R.B., 544 F2d 815 (1977) and noted that if, after a full review of the record the court was unable to conclude that the evidence supporting the Board's determinations is substantial, it should deny enforcement.

In Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S.402, the Supreme Court reversed the Sixth Circuit's decision, which affirmed a district court's summary judgment in favor of the Secretary of Transportation's administrative determination, and remanded the case to the district court for "plenary review" of the administra-

tive decision, allowing the court in its discretion to remand the cause to the appropriate agency and official for further proceedings, if necessary.

The Court of Appeals for the Tenth Circuit recognized conflict with the decisions of the Court of Appeals for the Ninth Circuit in Nickol v. United States, 501 F2d 1389, 1390, "One court has characterized a judicial determination of whether a finding of fact (in an administrative proceeding) is supported by substantial evidence as 'only a question of law' and therefore subject to disposition by summary judgment'. Dredge Corp. v. Penny, 338 F2d 456 (9th Cir.). See also Beane v. Richardson, 457 F2d 758 (9th Cir); Henrikson v. Udall, 350 F2d 949 (9th Cir); ..." "The very purpose however of such judicial review of agency

action is to examine the facts in the record. Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 at 484" The Tenth Circuit held in Nickol that entry of a Fed. R. Civ. P. 56 type of summary judgment is precluded where a court must determine whether an agency determination is 'unsupported by substantial evidence and where there is 'substantial controversy' as to the material facts in the record.

For the foregoing reasons, your petitioners pray that a writ of certiorari to the United States Court of Appeals for the Ninth Circuit issue and to permit petitioners to present their case on the merits.

Dated: July 25, 1980.

William Braly Murray
Attorney for Petitioners
505 Title & Trust Bldg.
Portland, Oregon 97204
Telephone: (503) 226-3819